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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

ROBERT ALBON GRAYSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Robert Albon Grayson, prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Illinois in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

On January 24, 1962, in the Criminal Court of Cook County, Illinois, petitioner was found guilty by the court of having on July 28, 1961 unlawfully possessed a narcotic drug, to-wit: marijuana, in violation of Chapter 38, Section 192.28.38, the Uniform Narcotic Drug Act, Illinois Revised Statutes. On February 9, 1962, judgment was entered on said finding and the defendant was sentenced

to the Illinois State Penitentiary for a term of not less than two nor more than three years. Petitioner's post trial motion to vacate the finding, judgment and sentence and to grant petitioner a new trial were denied on March 19, 1962. Said judgment is not reported, but is contained in the record filed with and certified by the Clerk of the Supreme Court of Illinois and transmitted herewith.

The opinion of the Supreme Court of Illinois affirming said judgment was filed on September 27, 1963, and is reported in 29 Ill. (2d) 229, 193 N.E. (2d) 801.

JURISDICTION.

On November 25, 1963, it was ordered that the petition for re-hearing be denied. This petition is filed within ninety days of the denial of the petition for re-hearing by the Supreme Court of Illinois. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257(3).

THE QUESTIONS PRESENTED FOR REVIEW.

1. Is a trial, judgment and sentence, in which an agent of the Federal Bureau of Narcotics admittedly committed perjury, which was called to the attention of and admitted before and to the trial court, but on which the trial court took no action, repugnant to and violative of the "Due Process Clauses" of the Constitution of the United States?

2. Where a Federal Narcotic Agent testified on a preliminary hearing that he saw the defendant throw a package (containing marijuana) out of an automobile window, but where said agent testified on the trial of the cause that he did not see the defendant throw the package from the automobile, and where, after the trial

court has found the defendant guilty of the possession of the marijuana thrown from the automobile, and then, on the hearing of the defendant's post trial motion for a new trial, the agent's aforesaid perjurious contradictory testimony is called to the attention of the trial court, and the agent, in response to the court's inquiry, endeavored to explain his perjury by stating that he so testified on the preliminary hearing because, *"None of the other agents were present. I was just making the presentation alone"*, and to which the trial court merely responded, *"I know sometimes they get careless presenting evidence because the other agents aren't there,"* and the trial court took no further action but denied the defendant's motion for a new trial and sentenced him to imprisonment, should not This Court invoke its supervisory power over Federal law enforcement officers?

3. Where, after the trial court has found the defendant guilty of the possession of the marijuana thrown from the automobile, the defendants files in and presents to the trial court a written motion for a new trial, setting forth therein the agent's perjurious contradictory testimony on the preliminary hearing and on the trial of the cause, and, where, on the hearing of the defendant's motion for a new trial, the trial court states that the Federal Narcotic Agent testified on the preliminary hearing before another Judge that he saw the defendant throw the package from the automobile, and testified on the trial of the cause before him that he did not see the object thrown from the car, and, where, the trial court thereupon asked the agent if he did not give such perjurious contradictory testimony, and, where, the agent admits that he gave such perjurious contradictory testimony because he was the only agent at the preliminary hearing, and, where, the trial court only responded that he was aware that the

agents are careless in presenting evidence because of the absence of other agents, and, where, the Supreme Court of Illinois then holds that the agent's perjury "*was not presented to or passed upon by the trial court, and this claim will therefore not be considered on the writ of error,*" has not the trial court, as well as the Supreme Court of Illinois, decided a federal question of substance not in accord with and which conflicts with applicable decisions of This Court; and, has not the Supreme Court of Illinois, by its failure and refusal to consider and pass upon the agent's perjury and its effect on the validity of the judgment of conviction, which was presented to and passed upon by the trial court, so far departed from the accepted and usual course of judicial proceedings as to be violative of the defendant's right of appellate review as guaranteed the defendant under "the Due Process Clauses" of the Constitution of the United States of America?

THE CONSTITUTIONAL PROVISIONS AND THE STATUTES INVOLVED.

The pertinent provisions of Chapter 38, Sec. 192.28-38, The Uniform Narcotic Drug Act, Vol. 1, Page 1541, Illinois Revised Statute, in effect on July 28, 1961, the date on which the offense was allegedly committed, but presently Chapter 38, Sec. 22-40, Illinois Revised Statute, 1961, Vol. 1, page 1758, provides as follows:

> "Whoever violates this Act by possessing, having under his control, manufacturing or compounding any narcotic drug shall be fined for the first offense not more than $5,000 and be imprisoned in the penitentiary for a period of not less than two years nor more than ten years."

Chapter 38, Sec. 192.28-2.17, Sub. Sec. (C), Illinois Revised Statute, 1959, Vol., page 1534, and/or Chapter 38, Sec. 22-2, Sub. Sec. (R)(3) provides:

> "Narcotic drugs mean any of the following: • • • Cannabis includes all parts of the plant Cannabis Sitava L. (commonly known as marijuana), whether growing or not; • • •."

The pertinent provision of the 5th Amendment to the Constitution of the United States of America is:

> "No person shall be • • • deprived of life, liberty or property without due process of law; • • •".

The pertinent provisions of the 14th Amendment to the Constitution of the United States are:

> "• • • Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the law."

STATEMENT OF THE CASE.

At or about 5 P.M., July 28, 1961, petitioner was driving his automobile east bound, along the north curb of the Midway Plaisance in Chicago, Cook County, Illinois. Sylvester Bush and Marshal Jackson were passengers on the rear seat of the car. (A. 15, 21).[1] Federal Narcotic Agent Connelly drove his car to the passenger side of petitioner's car. Federal Narcotic Agent Vernon D. Meyer, a passenger in the automobile driven by Agent Connelly, yelled across Agent Connelly, told petitioner to stop his car and showed petitioner his badge. (A. 17-18).

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[1] (A. 15, 21) indicates the page of the printed record filed in the Supreme Court of Illinois.

Petitioner immediately stopped his car. Agents Connelly and Meyer drove just a few feet ahead of and in front of petitioner's car and stopped their car at an angle. Federal Narcotic Agents Wm. Olivanti and Stephen R. Hnatt stopped the automobile in which they were riding directly behind petitioner's car. It was at this time that Petitioner was supposed to have been seen to throw a package from the automobile, (A. 24-29). The package contained marijuana.

Petitioner, Bush, Jackson and the automobile were searched several times at the scene, (A. 37). Not one of the agents at the scene commented to or questioned them about the package, (A. 20, 24, 25, 27). Agent Hnatt did not recall if anyone asked petitioner, or the two occupants of the car, at the scene, if either of them had thrown the package out of the car, (A. 30). Agent Olivanti testified that he picked up the package, looked at it and put it in his pocket but he did not say anything to either of the three men at the scene of the arrest, (A. 25).

Petitioner, Bush and Jackson were transported from the scene by Agents Meyer and Connelly to a Chicago Police Station located at 53rd and Lake Park Avenue and from there to the office of the Federal Bureau of Narcotics at Canal and Van Buren Streets, Chicago, Illinois, (A. 16, 38). It was at the office of the Federal Bureau of Narcotics that the agents, for the first time, questioned petitioner, Bush and Jackson. The nature of the questions was whether either of them had possessed or thrown the package from the car or had knowledge of it, (A. 19, 20, 24-27, 38). Agent Meyer asked, "*I ASKED THEM WHOSE*,—if they had any knowledge of the marijuana," (Italics added), and they each denied ever having had the package in their possession. (A. 20).

Agent Olivanti did ont recall if any of the agents asked the three men whether they had thrown the package from the car, (A. 2-527).

Agent Meyer signed and swore to three separate complaints in which petitioner, Bush and Jackson were each individually and separately charged with the possession of the one package of narcotics that petitioner was allegedly seen to have thrown from the automobile, (A. 20, 30, 32-34, 40). Said complaints, (A. 32-34), were filed in the Municipal Court of Chicago, on leave granted to agent Meyer. Agent Meyer testified that he signed, swore to and filed the complaints, each charging petitioner, Bush and Jackson with the possession of the one package of marijuana, because he wanted to "bring it to the attention of the arraigning Judge in Branch 57 (Municipal Court of Chicago) that Bush and Jackson were in the company of petitioner," and that "once an arrest had been made, we felt that we had no authority to release the others," (A. 20-21).

When the complaints for examination against Bush and Jackson came on for a preliminary hearing in Branch 57 of the Municipal Court of Chicago on July 31, 1961, Agent Meyer then testified that he observed petitioner throw the package from the automobile, (A. 3, 10, 12). On the trial of the instant cause on December 28, 1961, Agent Meyer testified that he did not see petitioner throw the package out of the automobile and that the first time he saw the package was when agent Olivanti retrieved it and later gave it to him, (A. 16).

The defendant denied, when he was questioned by the agents at their office and on the trial of the cause, that he had ever possessed the package, and denied having thrown it from the car, (A. 38-39). On January 24, 1962,

the trial court found the defendant guilty of the possession of marijuana contained in the package. Bush and Jackson were discharged on the preliminary hearing.

On March 9, 1962, the defendant filed in the trial court a written motion and petition to vacate the finding of guilty and sentence and grant petitioner a new trial; (A. 2). Said motion had attached thereto, as an exhibit, the certified transcript of the proceedings of the preliminary hearing of Bush and Jackson in Branch 57 of the Municipal Court of Chicago of July 31, 1961, (A. 8-12). It was in this proceeding that agent Meyer testified that he saw petitioner throw the package from the car. In paragraph 1(a) of the defendant's motion for a new trial, (A. 3-4), petitioner pointed out to the trial court that agent Meyer testified in the Municipal Court on the preliminary hearing of Bush and Jackson on July 31, 1961, that he saw petitioner throw the package from the automobile, (A. 3), and that on the instant trial he testified that he did not see the defendant throw the package from the automobile, (A. 4). The defendant further asserted and set forth in his motion for a new trial that the trial, finding, judgment and sentence deprived him of his rights guaranteed by the 5th Amendment to the United States Constitution and "due process of law," guaranteed him by both the Federal Constitution and the State of Illinois, (A. 7).

Petitioner's motion to vacate the judgment and sentence and for a new trial came on to be heard on March 9, 1962, (A. 42). Petitioner's counsel in support of the motions, among other things, argued to the trial court the aforementioned perjurious contradictions of agent Meyer's testimony in the Municipal Court and on the trial of the cause. The trial court replied:

(A. 43) "The Court: I can recall the testimony that I read. *THIS OFFICER TESTIFIED BEFORE JUDGE BARTH THAT HE SAW THE DEFENDANT THROW THE PACKAGE OUT OF THE CAR.*

Mr. Engerman: (Assistant State's Attorney) No, Judge. He said he observed an object.

The Court: An object. *BEFORE ME HE TESTIFIED HE DID NOT SEE THE OBJECT THROWN OUT OF THE CAR.*

Mr. Engerman: No, Judge.

The Court: That he saw the other agent pick it up in the parkway.

* * *

The Court: * * * What's your contention, Mr. Evins?

Mr. Evins: It is my contention, Judge, that the agent, when he testified before Judge Barth, testified that he observed the defendant Robert Grayson throw the package containing marihuana out of the car. And I further contend that the court himself, Judge Barth, asked him did he observe the object being thrown from the car and Agent Meyer answered "Yes."

I further contend that from the testimony given by the agent, Mr. Meyer before Judge Barth he was asked this question, in substance, by the Assistant State's Attorney, "After you secured the package, did you stop the car?" He answered "Yes."

I further contend that when he got here in the Criminal Court, when he was asked concerning this package, on cross examination, he said to the court, under oath,—and he was under oath in the Municipal (A. 44). Court—that the first time that he observed that package was when Agent Olivanti picked it up. That's what I am contending, that he gave contradictory testimony before Judge Barth than what he gave before you.

* * *

(A. 45) The Court: He said the first time he saw it was when it was in the air. Now, after he testified to that,—I agree with you—he said,

(A. 46): "Where did you first see that package?

"In the air.

"Did you see it before it was in the air?

"No, sir."

Mr. Evins: Now, which are you going to believe?

The Court: This, also, on direct examination.

"Did you see where the package came from?

"Yes, sir, I did.

"Where did it come from?

"From Mr. Grayson's hand."

Mr. Evins: It couldn't have come from his hand if the first time he saw it it was in the air, Judge.

The Court: *IT CAME FROM SOMEBODY'S HAND.*

Mr. Evins: *IT MAY HAVE COME FROM SOMEBODY'S HAND, BUT THE IMPORTANT POINT IS, WHO'S HAND DID IT COME FROM?*

The Court: *IF YOU WILL BE QUIET FOR A MINUTE, I CAN FIND OUT, PERHAPS.*

Mr. Evins: Yes, sir.

The Court: The question asked of Agent Meyer by Mr. Dunne, evidently an Assistant State's Attorney:

"Did you have occasion to observe the individual who threw the package allegedly containing narcotic substances from the car?

"A. Yes, I did."

This was a question asked by Dunne and this is an answer he made before Judge Barth?

Was it Judge Barth?

Mr. Evins: It was Judge Barth.

(A. 47): The Court: Oh, here's the transcript. This is your petition for a new trial. Yes, this is Judge Barth. Was this question asked of you by Mr. Dunne, page 5 of the transcript?:

"Did you have occasion to observe the individual who threw the package allegedly containing narcotic substance from the car?

"Yes, I did.

"Is that individual here present in court?

"No, he is not."

Mr. Engerman: *JUDGE, IF I MAY EXPLAIN. AT THAT TIME—*

The Court: *I DON'T WANT YOU TO EXPLAIN IT. I WANT MEYER TO EXPLAIN IT.*

Mr. Engerman: As to the absence. There was a motion for a continuance.

The Court: *WHAT ABOUT THAT STATEMENT, MEYER?*

Agent Meyer: *YES, YOUR HONOR, I MADE THAT STATEMENT.* But, to my mind, that was in the interpretation of a question. I saw the individual who threw the package, because I knew who had thrown it, from talking to the other agents, and therefore I answered "Yes," because I saw him after we made the arrest. I never testified that I saw any certain individual throw a package.

The Court:

"Did you have occasion to observe the individual who threw the package allegedly containing narcotic substances from the car?

"Yes, I did.

"Is that individual here present in court?

"No, he is not.

* * *

(A. 48) "Was the object thrown by either one of the two gentlemen here present in court? That's Bush and Jackson.

"A. No."

Agent Meyer: *IF I MIGHT, YOUR HONOR, I WOULD LIKE TO ADD THAT AT THAT TIME, ALSO, I WAS PRESENTING THE CASE DOWN IN BRANCH 57. NONE OF THE OTHER AGENTS WERE PRESENT. I WAS JUST MAKING THE PRESENTATION ALONE.*

The Court: The Court again asked you:

"I understand that you saw the object flying from the car.

"Yes, your Honor."

* * *

> The Court: Hnatt said he saw him throw it. *I DON'T THINK IT'S IMPORTANT THAT THE ONE AGENT IS IN THE MUNICIPAL COURT. I KNOW SOMETIMES THEY GET CARELESS PRESENTING EVIDENCE BECAUSE THE OTHER AGENTS AREN'T THERE.* The motion for a new trial will be denied and the original sentence may stand."

In the Supreme Court of Illinois, as in the trial court, petitioner urged that his "trial, judgment and sentence were void, repugnant to and violative of the 'Due Process' clauses of the Constitutions of the State of Illinois and The United States of America, because perjury was admittedly committed by a Federal Narcotic Agent, which perjury the agent confessed to the trial court, but on which the trial court took no action." In spite of the aforestated proceedings had in the trial court on the hearing of petitioner's post-trial motions to vacate the judgment and sentence and for a new trial, the trial court's inquiries to the agent regarding his perjurious contradicting testimony, the agent's response thereto, the trial court's ruling denying the motions, the Supreme Court of Illinois, in affirming the judgment and sentence, held, 193 N.E. (2) 801, P. 805-806:

> "The claim of perjury in the present case was not presented to the lower court at any time during the trial. The defendant contends, however, that the issue was raised in a post-trial motion to vacate the judgment of conviction and that therefore the issues is properly before this court. • • • *THE GENERAL CLAIM THAT THE DEFENDANT WAS CONVICTED WITHOUT DUE PROCESS OF LAW WAS INSUFFICIENT TO PRESENT THE PERJURY ISSUE TO THE TRIAL COURT. WE ARE OF THE OPINION THAT THE CLAIM NOW ADVANCED BY THE DEFENDANT WAS NOT*

PRESENTED TO, OR PASSED UPON BY, THE TRIAL COURT AND THIS CLAIM WILL THEREFORE NOT BE CONSIDERED ON THIS WRIT OF ERROR." (Italics added)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

In the case at bar, a Federal law enforcement officer stood before the original bar of justice and admitted that he had committed perjury. His nebulous explanation for his having done so was that it was necessary because he was in court alone, without the other agents. This reprehensible conduct falls far short of that expected of a Federal law enforcement officer. It most assuredly is not of that caliber demanded of him by This Court in the exercise of This Court's supervisory power over him.

In the exercise of This Court's supervisory power over Federal law enforcement officers, This Court held that the agents' conduct fell short of the standards demanded of them by This Court in *McNabb* v. *U. S.*, 318 U. S. 332, 87 L.Ed. 819, where the agents, in their efforts to determine the identity of the murderer of their brother agent, obtained incriminating statements from the defendants, by unremitting questioning by numerous officers over a period of two days, and the defendants being ignorant and without the aid of friends or counsel and while being held in custody without being brought before a commission, the Trial Court admitted the statements into evidence.

The conduct demanded of agent Meyer in the instant case was no less because he was testifying in a state court rather than a Federal Court. Surely, his standard of conduct is not to be determined by the tribunal in which he is appearing. Certainly, no less is expected or demanded

of him in one tribunal than in another. His conduct in the case at bar *"tends to undermine the integrity of the criminal proceeding"* as did the agents' conduct in *McNabb*. Here, the agent's perjury and explanation therefore *"reveal a plain disregard of the duty enjoined by Congress upon Federal law officers,"* to a far greater extent than the agents' conduct revealed in *McNabb*.

In *Rea* v. *U. S.*, 350 U. S. 214, 100 L.Ed. 233, 76 S.Ct. 292, the Federal Agent sought to use marijuana, which had been previously suppressed in a Federal Court, as evidence against the defendant in a state court proceeding. In holding that the District Court erred in denying his request for an injunction to restrain the agent from so doing, This Court held: 350 U. S., 214, P. 216-217; 100 L.Ed. 233, P. 236:

> *"IN THIS POSTURE WE HAVE THEN A CASE* that raises not a constitutional question but one *CONCERNING OUR SUPERVISORY POWER OVER FEDERAL LAW ENFORCEMENT AGENCIES.* A Federal agent has violated the federal rules governing search and seizures * * * The power of the Federal Courts extends to policing those requirements and making certain that they are observed."

In the instant cause, a Federal law enforcement officer has violated a federal, as well as a state rule, of equal, if not greater magnitude than the rules governing searches and seizures. It raises a question concerning This Court's supervisory powers over him as did the agent's conduct in REA. The power of This Court, it is respectfully urged, should be exercised in the case at bar to police and make certain that the agent observe the standards expected and required of him.

The agent's conduct here was far more violative of the Federal Rules than was the agents' conduct in *Mallory* v.

U. S., 354 U. S. 449, 1 L.Ed. (2) 1479, 77 S.Ct. 1356, where the agents extracted a confession from the defendant at a time when the defendant, under the Federal Rules, should have been taken by the agents before a committing magistrate.

II.

In *Napue* v. *Illinois*, 360 U. S. 264, 3 L.Ed. (2) 1217, 79 S.Ct. 1173, it was a co-defendant who falsely swore that he had not been promised consideration for his testimony. The prosecutor knew this to be false but took no action to correct it. In the case at bar, the prosecutor knew that the agent's testimony was false. When the trial court inquired of the agent why he so testified, the prosecutor promptly endeavored to explain it, (A. 4). The trial court rejected the prosecutor's proposed explanation and directed agent "*Meijer to explain it,*" (A. 47). When the agent answered that he had done so because he was at the preliminary hearing alone, the world then knew it—that a Federal law enforcement officer had committed perjury to avoid inconveniencing a brother agent by having him come to court.

In *Napue*, 360 U. S. 264, p. 270, 3 L.Ed. (2) 1217, P. 1221. This Court held:

> "*THE PRINCIPLE THAT A STATE MAY NOT KNOWINGLY USE FALSE EVIDENCE, INCLUDING FALSE TESTIMONY TO OBTAIN A TAINTED CONVICTION*, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

In *People* v. *Savvides*, 1 N.Y. (2) 554; 136 N.E. (2) 853, the defendant was charged with the unlawful possession of a narcotic drug. A witness for the prosecution falsely

testified that he did not expect consideration for his testimony. The defendant was convicted. The defendant applied to the trial court for a writ of error *coram nobis* on the ground of the witness' perjury. The writ was denied. On review, the defendant was awarded a new trial. The language of the court, approvingly relied upon and quoted by This Court in *Napue* is most appropriate here, 136 N.E. (2) 853, P. 854, 855:

> "The conviction cannot stand. The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.
>
> • • • •
>
> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A LIE IS A LIE, NO MATTER WHAT ITS SUBJECT,* • • •. Nor does it avail respondent to contend that the defendant's guilt was clearly established or that disclosure would not have changed the verdict.
>
> • • •
>
> "• • • *WE COULD HERE AFFIRM ONLY IF WE WERE TO ANNOUNCE A DOCTRINE THAT THE FUNDAMENTALS OF A FAIR TRIAL NEED NOT BE RESPECTED IF THERE IS PROOF IN THE RECORD TO PERSUADE US OF DEFENDANT'S GUILT.*" (Italics added)

The affirmance of the judgment of conviction in the case at bar is judicial condonation of perjury as a mere "*Careless presentation of evidence because the other agents aren't there.*" We beg This Court to refuse to affix its stamp of approval to the agent's testimony or the trial court's inept and spurious characterization of it. This conviction "must fall under the Fourteenth Amendment." *Napue* v. *U. S.*, 360 U. S. 264, P. 269.

The trial court's judicial acceptance, approval and condonation of this agent's conduct by the fleeting observation, *"I DON'T THINK ITS IMPORTANT* that the one agent is in the Municipal Court. *I KNOW SOMETIMES THEY GET CARELESS PRESENTING EVIDENCE BECAUSE THE OTHER AGENTS AREN'T THERE,"* (A. 48), is legal abortion of the due process clause of the Fourteenth Amendment to the Constitution of the United States by a state judicial tribunal. But as This Court held in *Rea*, 350 U. S. 214, P. 217-218, 100 L.Ed. 233 P. 237;

> *"THE FACT THAT THEIR (THE FEDERAL RULES) VIOLATIONS MAY BE CONDONED BY STATE PRACTICE HAS NO RELEVANCY TO OUR PROBLEM • • • THE OBLIGATIONS OF THE FEDERAL AGENT IS TO OBEY THE RULES.* They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. • • • *THAT POLICY IS DEFEATED IF THE FEDERAL AGENT CAN FLOUT THEM AND USE THE FRUITS OF HIS UNLAWFUL ACT EITHER IN FEDERAL OR STATE PROCEEDINGS."* (Italics added).

Here, the agent has violated the most fundamental and sacred rule known to the law—the oath. He did not fullfil his obligation to obey it. He has flouted and defeated it in a state proceeding. He has not complied with the prescribed standards of law enforcement.

III.

In *Napue*, The Supreme Court of Illinois, majority opinion, held that the perjury was of no consequence inasmuch as the jury was otherwise testimonially advised that the witness had been promised consideration for his tes-

timony, 13 Ill. (2) 566, 150 N.E. (2) 613, and affirmed the conviction. In the instant case, the Supreme Court of Illinois refused to consider or decide the effect of the agent's perjury on the constitutional validity of petitioner's judgment and sentence, holding, 29 Ill. (2) 229, 193 N.E. (2) 801, p. 806,

> "We are of the opinion that the claim now advanced by the defendant was not presented to, or passed upon by, the trial court and this claim will therefore not be considered on this writ of error."

Petitioner filed a written post-trial motion to vacate the judgment and sentence and for a new trial, (A. 2-12). The motion expressly set forth the agents' preliminary hearing testimony, (A. 3, 9-12), and his contrary trial testimony, (A. 4). The trial court expressly inquired of the agent about his diametrically opposite testimony, (A. 47). The agent stated that he did give such perjurious contradicting testimony and that he did so because the other agents were not present on the preliminary hearing, (A. 48). The trial court accepted it because the agents "*GET CARELESS PRESENTING EVIDENCE BECAUSE THE OTHER AGENTS AREN'T THERE,*" and denied the post-trial motions, (A. 48). It is patently apparent that the agent's perjury was presented to and passed upon by the trial court and should have been considered and passed upon by the Supreme Court of Illinois.

The Supreme Court of Illinois can no more avoid This Court's holding in *NAPUE*, by erroneously refusing to pass upon or consider petitioner's claim that the agent's perjury invalidated his judgment and sentence under the Fourteenth Amendment to the Constitution of the United States, than it could by its holding in *NAPUE* that the perjury did not invalidate Napue's judgment of conviction.

Moreover, the Illinois Supreme Court's refusal to consider petitioner's claim that the agent's perjury voided his judgment and sentence, though presented to and passed upon by the trial court and properly preserved and presented for review to the Illinois Supreme Court, in and of itself runs afoul of petitioner's right of appellate review, under the "due process' clause of the Fourteenth Amendment to the Constitution of the United States. Because the Illinois Supreme Court erroneously refused to consider petitioner's claim, petitioner has not had appellate judicial review thereof. He earnestly urges that This Court grant him such review.

Respectfully submitted,

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APPENDIX A

Docket No. 37799—Agenda 32—May, 1963.

The People of the State of Illinois, Defendant in Error, v. Robert Albon Grayson, Plaintiff in Error.

Mr. Chief Justice Klingbiel delivered the opinion of the court:

Robert Grayson, referred to herein as the defendant, was tried in the criminal court of Cook County by the court without a jury and convicted of the crime of unlawful possession of narcotic drugs, for which he was sentenced to the penitentiary for a term of not less than two nor more than three years. A writ of error has been issued to review the judgment of conviction.

The defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt, and a detailed analysis of the evidence is therefore required. William Jackson, a Federal narcotics agent, testified that on July 28, 1961, he saw the defendant arrive at the Pershing Hotel in an automobile and enter the hotel. At about 5:00 P.M., the defendant and two other men left the hotel, entered the defendant's car, and drove away.

Another Federal agent, Vernon Meyer, testified to substantially the same facts. He went on to testify that when the defendant drove away from the hotel he and another agent followed the defendant's car. A few blocks from the hotel they drove alongside the defendant's car, identified themselves as Federal agents, and ordered the defendant to pull over to the curb. At that time the defendant was driv-

ing and the other two men were seated in the rear seat. The Federal agents pulled their car in front of the defendant's car and Meyer got out and walked over to the defendant's car. As he was approaching the defendant's car Meyer observed another agent, William Olivanti, pick up a brown paper bag which was on the terrace near the street on the driver's side of the defendant's car. It was later established that this paper bag contained marijuana. On cross-examination Meyer explained that agent Olivanti, and another agent, Stephen Hnatt, were in a car immediately behind the Meyer car and that they had followed the defendant and Meyer from the hotel. He testified on cross-examination that when Olivanti picked up the package he opened it and inspected it and then said, "I have the marihuana," or something like that. Meyer testified that he ordered the defendant out of the car and searched him but found nothing on his person. He asked the defendant if he knew anything about the package that Olivanti had picked up and the defendant denied having had possession of it. He also testified that the other two men in the defendant's car, Marshall Jackson and Sylvester Bush, were asked if they had any knowledge of the marijuana and they both denied any knowledge of it. So far as Meyer recalled, none of the other agents asked any questions at that time. It was brought out on cross-examination that Meyer signed complaints against Jackson and Bush charging them with possession of narcotics. He explained on redirect examination that since these men were in the company of the defendant he filed the complaint to bring it to the attention of the court since he felt that the court, rather than the agents, should decide whether all three men should be held.

Olivanti testified that he and Hnatt followed the Meyer car from the hotel in a car driven by Hnatt. After the

Meyer car pulled in front of the defendant's car Olivanti saw the defendant throw a paper bag out of the window of his car. As soon as Olivanti's car stopped he got out and retrieved the paper bag. He testified that after he examined the package he said that it was marijuana. He did not talk to the defendant at that time and did not hear Meyer question the defendant or the other men. He testified that after the defendant and Bush and Jackson were taken to the narcotics bureau, all of them were questioned and they all denied knowledge of the narcotics.

Hnatt repeated the testimony with regard to the pursuit of the defendant and testified that he saw the defendant throw the package to the ground. In response to further questioning on direct examination he stated that he first saw the package in the air and did not see it before it was in the air. Counsel for the defendant moved that the witness's statement that he saw the defendant throw a package be stricken in view of his statement that he first saw the package in the air. However, the court refused to strike this statement and Hnatt went on to testify that he saw the package leave the defendant's hand. On cross-examination he said that he saw the package just about simultaneously with the stopping of the defendant's car. He testified that his view of the defendant was obstructed by one of the passengers in the rear seat of the defendant's car. However, he could see the defendant's arm out the window of the car.

For the defense there were admitted in evidence copies of the complaints signed by Meyer charging Jackson and Bush with possession of narcotics. The only other evidence for the defendant was the testimony of the defendant himself. He testified that shortly before 3:00 P.M. on the day in question, Jackson telephoned him and asked

if he could come to the defendant's house to see him. The defendant told him to come ahead, and shortly thereafter Jackson, Bush and another man came to the defendant's house where they stayed for about 15 minutes. They left the house in the defendant's car and when they got to the Pershing Hotel, Jackson asked the defendant if he would drop him off there for a few minutes. According to the defendant he, Jackson, Bush and the other man all went into the hotel and the defendant went into the bar by himself where he stayed for a few minutes. Jackson and Bush joined him shortly thereafter and the three men got into the defendant's car and drove away. The defendant testified that when he was stopped by Meyer he asked the agents whether he had done anything wrong and the agents ordered him to get out of the car and searched him. He denied ever having possession of any narcotics and denied throwing a package out of the car. He did not know whether Jackson and Bush had any narcotics in their possession and did not see either of them throw any package out of the car. The defendant testified that the three men were first taken to the police station where they stayed for about an hour without being questioned and that from there they were taken to the Federal Narcotics Bureau where all three were questioned. While the defendant was in the narcotics bureau with the agents and the other men, an agent came in with a brown package and said, "Look what we found." Another agent asked him what it was and he replied that it was marijuana. According to the defendant, Meyer then asked him if he knew anything about the package and asked him if he had thrown it out of the car or if he had seen anyone else throw it out, and the defendant replied that it was not his package and he knew nothing about it. Defendant testified that Meyer then told him, "It's your car and somebody has to pay for it." He testified on cross-

examination that the agents did not show him the package at the scene of the arrest.

In rebuttal, Meyer testified that the first time he saw the package of narcotics it was in Olivanti's hand. He testified that Olivanti showed the package to the defendant at the time of the arrest. On cross-examination he testified that at the scene of the arrest he did not ask the defendant if he had thrown the narcotics and that he was not present when anyone else asked him about it.

The defendant makes several contentions with respect to this evidence. He argues that if Olivanti and Hnatt had seen him throw the package from the car they would have accused him of doing so, and contends that their failure to make this accusation, coupled with the fact that all three men were asked whether they knew anything about the narcotics, indicates that they did not see the defendant throw the package. Related to this argument is the contention that the agents' failure to question the defendant and the other two men in detail either at the scene of the arrest or at the city police station casts doubt upon the testimony that the defendant threw the package from the car. We are unable to agree with the defendant's contention. The fact that the officers did not at any time directly accuse the defendant of throwing the package out of the car or tell him that they had seen him do so is not necessarily inconsistent with the testimony of the two agents that they had seen him throw the package. Their failure to make this accusation goes only to the credibility of their testimony, which was a matter for the trial court to determine. We attach no significance to the fact that the agents, all Federal employees, waited until they arrived at the Federal Narcotics Bureau to question the defendant and the others at length.

The defendant also alleges that Olivanti's testimony that he saw the defendant throw the package is unworthy of belief because he was not in a position to see. He argues that since Hnatt, who was driving the car in which Olivanti was a passenger, did not have a full view of the defendant, that Olivanti likewise could not see him. Hnatt testified that he was unable to see the defendant because his view was obstructed by one of the men in the rear seat of the defendant's automobile. Olivanti was riding on the passenger side of the car so that his opportunity for observation was different from Hnatt's and there is nothing inherently impossible or improbable in Olivanti's testimony.

The defendant also argues that the testimony of Meyer and Olivanti was contradictory in that Olivanti testified that after he retrieved the package he put it in his pocket and retained custody of it, and Meyer testified that Olivanti showed the package to the defendant at the time of the arrest. This minor inconsistency in no way casts doubt upon Olivanti's testimony that he saw the defendant throw the package. In every trial there are minor variances between the testimony of several witnesses and such variances do not necessarily create reasonable doubt as to the defendant's guilt.

The next contention advanced by the defendant is that the fact that Meyer filed complaints against all three men indicates that he did not know who had been in possession of the narcotics. Possession of narcotics may be joint, and in our opinion the fact that a complaint was filed against all three men does not indicate that Meyer was in doubt as to whether the defendant had been in possession of the drug.

Finally, in support of his contention that a reasonable doubt exists as to defendant's guilt, the defendant con-

tends that a remark made by the trial judge at a hearing on a motion to vacate the judgment of conviction indicates that the judge himself entertained a reasonable doubt as to the defendant's guilt. At that hearing, which took place about two months after the conviction, defendant's counsel argued that agent Hnatt's testimony was unworthy of belief because his testimony that he saw the package leave the defendant's hand was inconsistent with his own testimony that he first saw the package while it was in the air. As we have previously noted, this contention was made during the trial by a motion to strike Hnatt's testimony, which was denied by the court. At the hearing on the motion to vacate the conviction, defendant's counsel stated, "It couldn't have come from his hand, if the first time he saw it, it was in the air, Judge." At this point the court said, "It came from somebody's hand." Counsel then replied, "It may have come from somebody's hand, but the important point is, whose hand did it come from?" The court then replied, "If you will be quiet for a minute I can find out, perhaps." Counsel argues that this statement by the court indicates that the court was not satisfied beyond a reasonable doubt that the defendant threw the package. We do not believe that the court's remark is subject to this interpretation. The hearing on the motion to vacate took place about two months after the judgment of conviction. The record shows that at the conclusion of the evidence at the trial the court remarked that he had checked over the evidence very carefully and found that two Federal agents had testified that they saw the defendant throw the package out of the window. The court noted that the only defense interposed by the defendant was a denial and an argument that it was impossible for the agents to see the defendant throw the package. The court pointed out that this argument was not valid since the agents were

only about 10 feet behind the defendant's car and were in a position to see him throw the package. These remarks at the time of the finding of guilty indicate that the judge was at that time satisfied beyond a reasonable doubt as to the defendant's guilt and his remarks two months later, when his recollection of the testimony was doubtless not as clear, afford no basis for concluding that the trial judge was not satisfied beyond a reasonable doubt that the defendant was guilty.

The defendant's second claim is that he was convicted by the knowing use of perjured testimony. Such a claim will not generally be considered in reviewing a judgment of conviction, since in most cases the issue has not been presented to the trial court and the facts in support of the claim do not appear in the record. (*People* v. *Hoskins*: 25 Ill. 2d 333, 336.) The claim of perjury in the present case was not presented to the lower court at any time during the trial of the case. The defendant contends, however, that the issue was raised in a post-trial motion to vacate the judgment of conviction and that therefore the issue is properly before this court. We have therefore carefully examined that motion. The defendant contended therein, that: "The testimony of the three Federal Narcotic Agents of the events occurring on the Midway Plaisance and upon which the court determined that Robert Albon Grayson and not one of the two persons in the automobile he was driving possessed the marijuana described in the indictment, is contradictory and improbable —so improbable that it can not be said that defendant, Robert A. Grayson has been proved guilty beyond a reasonable doubt as required by law." The motion then set forth the alleged contradictions and improbabilities in considerable detail. The first such contradiction involves the testimony of agent Meyer. The motion charged

that Meyer testified at the preliminary hearing of Bush and Jackson that he saw the defendant throw a package from the automobile and that he stopped the defendant's car after securing the narcotics. The motion claimed that this testimony was contrary to his testimony at the trial where he testified that he first saw the package when Olivanti picked it up and was also contradicted by Olivanti's testimony at the trial that the defendant threw the package after his car had been stopped by Meyer's car. The motion next claimed that agent Hnatt's testimony at the trial that he saw the package leave the defendant's hand was inconsistent with his own testimony that he first saw the package in the air. It was also urged that Olivanti was not in a position to see the defendant throw the package and, finally, it was alleged that the fact that Meyer charged all three men with possession indicated that he had a doubt as to who had thrown the package. Nowhere in these detailed allegations did the defendant claim that he was convicted on perjured testimony. The thrust of his argument was that the testimony of the agents was conflicting and improbable and was therefore insufficient to establish the defendant's guilt beyond a reasonable doubt. Such a contention falls short of a claim that the State knowingly used perjured testimony. In addition to these detailed allegations the motion also set forth in general terms that the finding of guilty was against the weight of the evidence and contrary to law; that the court erred in his rulings on the admissibility of evidence; that the defendant had been deprived of the rights guaranteed to him by the fourth amendment to the United States constitution and by section 6 of article II of the Illinois constitution; and that he did not receive a fair trial and was found guilty without due process of law. The constitutional provisions set

forth in the motion pertain only to unreasonable searches and seizures. The general claim that the defendant was convicted without due process of law was insufficient to present the perjury issue to the trial court. We are of the opinion that the claim now advanced by the defendant was not presented to, or passed upon by, the trial court and this claim will therefore not be considered on this writ of error.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B

People of the State of Illinois,

Defendant-in-Error,

vs.

Robert Albon Grayson,

Plaintiff-in-Error.

No. 37790

Order, entered November 25, 1963

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.